United Nations / International Maritime Organization

Conference of Plenipotentiaries on a Convention on Maritime Liens and Mortgages

Distr.
GENERAL

A/CONF.162/3/Add.3
8 April 1993

Original: ENGLISH

Geneva, 19 April 1993
Item 8 of the provisional agenda

PREPARATION AND ADOPTION OF A CONVENTION ON MARITIME LIENS AND MORTGAGES

Compilation of comments and proposals by Governments, and by intergovernmental and non-governmental organizations, on the draft convention on maritime liens and mortgages

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GE.93-51314

I. INTRODUCTION

1. This document sets out the comments and proposals of non-governmental organizations on the draft convention on maritime liens and mortgages that were received between 5 and 29 March 1993. In that period, comments were received from the following: International Chamber of Shipping (ICS); Comité Maritime International (CMI).

II. COMPILATION OF COMMENTS AND PROPOSALS

International Chamber of Shipping

[Original: ENGLISH]

2. Shipping is by nature an international industry and the importance of international uniformity of maritime law is therefore widely recognized. This principle applies equally to the regime on maritime liens and mortgages.

3. In the opinion of ICS the existing system of maritime liens and mortgages is broadly satisfactory, but considerable improvements could be achieved through a more consistent international approach. The main problem with the existing system is that it has not received widespread ratification.

4. This problem could be solved through adoption of a convention on the lines of the draft developed for the Conference by the Joint International Group of Experts (JIGE) on the basis of a CMI draft, but only if it proves to attract world-wide ratification.

5. A regime on maritime liens and mortgages must contain a careful balance between the concerns of the holders of maritime liens, the holders of mortgages and other liens, and shipowners.

6. The security most readily available for claims at the lowest cost is the vessel itself and a number of maritime claims have traditionally been recognized as maritime liens for certain economic and social reasons. The granting of the status of a maritime lien involves a number of substantial advantages for claimants, notably priority of such liens over others and a lack of any requirement of registration. The highly privileged nature of maritime liens and the ensuing insecurity for buyers of vessels and creditors have made it necessary to limit the number of claims being accorded the status of a maritime lien.

7. It is in the interest of efficient trading that the number of maritime liens should be strictly limited. If too many maritime claims are granted maritime lien status frequent disruptions to the trading of the vessel could arise following disputes about those claims, and buying or selling vessels could become more difficult. Against that background there appears to be little justification for a maritime lien in respect of port, canal and other waterway dues, or pilotage dues, since the authorities responsible for these charges normally have their own means of enforcement, such as arrest.

8. It is clearly also in the interest of those who provide finance for shipping to keep the number of maritime liens low. An unreasonably high number of maritime liens could discourage investors from providing the necessary finance for new or second-hand vessels, because they could constantly face the risk of the value of their security being eroded. If the financing of vessels is to be encouraged there is a need to protect the position of the lender by providing as much security for his investment as possible. The complex system of maritime liens and mortgages, which gives priority to certain claims over others, results in the provision of finance for shipping being very specialized and thus limiting the number and type of institutions prepared to undertake such investment. A new convention must encourage rather than discourage the activities of such institutions.

9. In sum, ICS firmly supports the efforts to adopt a new convention on liens and mortgages to bring genuine uniformity into this complex area of international maritime law. If world-wide recognition is to be achieved it is necessary that the instrument represents a balanced compromise between the interests of those who need the special protection afforded by a maritime lien, other creditors and shipowners. ICS believes that the draft convention which is before the Conference broadly contains such a balanced compromise and hopes that, if adopted, it will achieve world-wide recognition.

10. ICS offers the following specific comments on the draft convention:

Article 4: Maritime liens

11. As stated above, ICS believes that the list of maritime liens should be as short as possible. The claims proposed in draft article 4 seem appropriate although there appears to be little justification for article 1(d) on claims for port, canal, and other waterway dues, and pilotage dues.

Article 6: Other liens

12. ICS believes that no other liens than those listed in article 4 should be labelled as maritime liens and be granted any of the preferential treatment that is accorded to maritime liens. The words "maritime liens or" in the first line of draft article 6 should therefore be deleted.

Article 6 bis: Rights of retention

13. Although it can be questioned whether a provision on rights of retention is appropriate in an instrument on liens and mortgages, there appears to be some merit in establishing the exact priority of rights of retention as against maritime liens and other liens. ICS accepts the proposed provisions in articles 6 bis and 11(3) on rights of retention.

Article 7: Characteristics of maritime liens

14. ICS firmly believes that only maritime liens as defined in draft article 4 should follow the vessel even after change of ownership, change of registration or change of flag. This is a specific privilege which must not be granted to any other liens being introduced in national law in accordance with draft article 6.

Article 8: Extinction of maritime liens by lapse of time

15. ICS agrees with the draft wording of article 8 which provides that maritime liens as set out in article 4 shall be extinguished after a period of one year.

Article 15: Temporary change of flag

16. ICS welcomes the provision on temporary change of flag which provides the necessary regulations for an increasingly common practice in shipping.

Comité Maritime International

[Original: ENGLISH]

17. The analysis and comments that follow are based on the draft articles annexed to the final report of the Joint Intergovernmental Group of Experts on Maritime Liens and Mortgages and Related Subjects (hereinafter called "JIGE") and are made in the hope that they may contribute to the work of the Conference.

Article 1

18. In the opening sentence the words (effected on seagoing vessels) "by their owners to secure payment of monies" that have been used in the draft approved by the CMI at the Lisbon Conference (hereinafter called "Lisbon Draft") with a view to ensuring that the other charges had the same character and purpose of mortgages and hypothèques, have been deleted. Such words had been adopted when the description of the charges was "similar registerable charges". After the replacement of such description with "charges of the same nature", they have become superfluous and therefore their deletion was correct.

19. Since it had been established that the requirement in Article 1(c) of the 1967 Brussels Convention that the amount secured be mentioned in the register or in the instrument referred to in subparagraph (b) had been one of the reasons why the Convention had not been ratified by several States, at the Lisbon Conference of the CMI it was decided to delete it. During the sessions of the JIGE strong objections were raised against such deletion on the grounds that in certain jurisdictions the indication of the amount secured was a compulsory requisite.

20. The reference to the maximum amount secured was therefore reinstated and becomes a condition for the recognition in States Parties of mortgages, hypothèques or charges of the same nature in two different situations, viz:

(i) if it is a requirement of the national law of the State of registration, or

(ii) if it is specified in the instrument creating the security.

21. The reference to the first situation may perhaps be unnecessary, for under (a) it is already provided that the mortgages, hypothèques and charges must be effected and not seem to have any negative effect.

22. The reference to the second situation seems redundant. In fact, the condition in subparagraph (c) is that certain information must be specified either in the register or in the instruments referred to in sub-paragraph (b).

23. With respect to such a situation, sub-paragraph (c) would therefore require that the instrument creating the security must mention the maximum amount secured ... when it actually does so.

Article 2

24. This article has been left unaltered as it respects the text of the 1967 Convention.

Article 3

25. Paragraph 1. This paragraph considers two cases, viz:

(i) the voluntary change of ownership, and

(ii) the voluntary change of registration,

and provides that when either of them entails the deregistration of the vessel from the national register of a State Party, such State Party shall not permit the owner to deregister the vessel unless the conditions specified therein are met. It may be worthwhile to consider each of such two situations separately:

(i) Voluntary change of ownership. The voluntary change of ownership (e g. a voluntary sale) may entail the deregistration of the vessel when the new owner is not permitted to keep the vessel under her original flag because he does not meet the nationality requirements.

In such a case, however, deregistration may occur rather than by an initiative of the owner, by a decision of the flag State. The provision whereby the flag State "shall not permit the owner to deregister the vessel" does not include the situation when it is the flag State itself that intends to effect the deregistration.

This situation should also be covered by the convention, nor can it be objected that deregistration would in such a case be a matter of public policy, in respect of which the convention ought not to intervene. In fact, it is always open to the flag State, if deregistration does not occur because the conditions set out in this paragraph do not materialize, to require that the vessel be sold.

(ii) Voluntary change of registration. Voluntary change of registration may entail the deregistration of the vessel, for example, when the owner registers it in another State without her prior deregistration from the original register. In such a case the State of the original register will require that the vessel be deregistered in order to avoid a double registration. Again deregistration will not be effected by the owner, but by the State - a situation which is not covered by this paragraph.

26. Paragraph 2. In this paragraph registration of a vessel in a State Party is made conditional to her deregistration from the previous register. Two alternatives are considered, viz, that a certificate has been issued to the effect that the vessel has been deregistered or that it will be deregistered at such time as the new registration is effected. In sub-paragraph (b), after the second alternative, there is an additional sentence stating that the date of registration (in the new register) shall be the date of deregistration of the vessel by the former State. This provision does not seem to be in line with the second alternative according to which it is the deregistration that will be effected when the new registration is made. The last sentence should therefore read:

> The date of deregistration shall be the date of the new registration of the vessel.

27. One further remark: the concurrence between deregistration and registration is ensured under the second alternative, but not under the first, where the deregistration occurs first, and the new registration occurs any time thereafter. If concurrence is deemed to be a requisite of the change of registration it should be ensured always; if not, why require it in one case only?

Article 4

28. The opening sentence of this article in the 1967 Convention was worded as follows:

> The following claims shall be secured by maritime liens on the vessel:

29. The provision relating to claims against persons other than the registered owner of the vessel was inserted in Article 7 - 1, which so stated:

> The maritime liens set out in Article 4 arise whether the claims secured by such liens are against the owner or against the demise or other charterer, manager or operator of the vessel.

30. This provision allowed claims to be brought against the vessel also when they were against any type of charterer, including the time and voyage charterer. When this provision was discussed at Lisbon by the CMI, it was deemed convenient, in the light of the accepted principle that maritime liens should be reduced as much as possible in order to strengthen mortgages and hypothèques, thereby encouraging ship financing, to reduce the possibility to being claims against the vessel when the debtor was a person other than the owner. It was thus decided to eliminate the reference to charterers, other than the bareboat charterer, who should stand because the crew is employed by the bareboat charterer and, for social reasons, the claims of the crew for wages must be secured by a maritime lien in any circumstances, irrespective of whether they are employed by the owner or by the bareboat charterer.

31. It was also decided to move the provision from article 7 to the preamble of article 4, since it was felt that a special provision was unnecessary. The wording of the opening sentence was left unaltered by the JIGE.

32. There are, however, other claims which, equally for social reasons, ought to be protected whilst at present they may not be. These are the claims in respect of loss of life or personal injury based on contract, when the carrier is neither the owner nor the bareboat charterer. In fact, also the time charterer - if not the voyage charterer - may enter into contracts for the carriage of passengers or into cruise contracts and become the contractual carrier. It may perhaps be held that the owner (or bareboat charterer) is also liable as performing carrier, but this may be doubtful. The question whether it was proper to drop out any reference to charterers other than the bareboat charterer may, therefore, be worthy of further thoughts.

33. Another question that may be considered is whether it is really necessary to mention, in addition to the bareboat charterer, the manager and the operator. The distinction between manager and operator should consist in that whilst the manager acts for the account of a third party, the operator acts for his own account. If this is correct, there should not be claims against the manager, but only against the person on whose behalf and for whose account the manager is acting, viz, the operator. As regards this latter person, it would appear that an operator cannot act in such a capacity, when he is not the owner, unless he has obtained the use of the ship by the owner and the contract whereby such use is obtained is normally, if not exclusively, the bareboat charterparty.[1/]

34. The individual maritime liens. The 1967 Convention has substantially reduced the number of maritime liens listed in the 1926 Convention by excluding two types of claim, viz, claims based on contract for loss of or damage to the cargo and claims resulting from contracts entered into or acts done by the master, necessary for the preservation of the vessel or the continuation of the voyage. It was thought in fact that the first category of claims did not require the special protection afforded by a maritime lien, since the shipper, besides being insured, can, if he acts with an ordinary prudence, choose a carrier who is financially responsible and therefore should not be allowed to be satisfied with priority over a mortgagee or the holder of a hypothèque if he fails to do so. It was then thought that by securing with a maritime lien claims of the second category, the owner was allowed to raise further funds, after he had obtained a loan secured by a registered charge, only because the new lender (viz, the supplier of services or provisions on credit terms) obtained a priority over the previous lender. It was also felt that an owner who needs credit to cover ordinary running costs does not deserve any protection, nor do the creditors who grant him such credit.

1/ The reference to the manager and to the operator was inserted in the second draft prepared by the CMI International Sub-Committee in 1964 (document HYPO 27, published on page 256 of the volume on the New York Conference of 1965), accepted by the CMI New York Conference and then by the Diplomatic Conference, apparently without any specific discussion.

35. A brief history and analysis of the individual maritime liens may perhaps be useful:

(a) Wages. It was controversial between the Maritime Associations members of the CMI whether social insurance contributions were included in the language of Article 4 paragraph 1(i) of the 1967 Convention and whether or not they ought to be included. At Lisbon, the majority felt that they were not included and that they ought to be, however, only to the extent of that part of contribution payable on behalf of the crew. The following wording was therefore adopted:

> Wages and other sums due to the master, officers and other members of the vessel's complement in respect of their employment on the vessel including social insurance contributions, payable on their behalf.

This wording was adopted by the JIGE who, however, felt it advisable to expressly mention, amongst the other sums due in respect of the employment on the vessel of the master, officers and other members of the vessel's complement, the costs of repatriation. This appears to be a useful addition.

(b) Loss of life or personal injury. The wording of Article 4, paragraph 1(iii) of the 1967 Convention was left unaltered at Lisbon and was subsequently adopted by the JIGE. It does not call for any special comment.

(c) Salvage. In the 1967 Convention a maritime lien was also granted in respect of claims for wreck removal and contribution in general average. The maritime lien in respect of general average contribution existed in the 1926 Convention and it was felt that it should be maintained. At Lisbon, however, the need for such a maritime lien was debated, even if at the end it was maintained on the grounds that it was similar in nature to that in respect of salvage. It was instead suppressed by the JIGE, together with the lien in respect of wreck removal. Perhaps the reasons why they were both suppressed might be reconsidered.

(d) Port, canal and other waterway dues and pilotage dues. All these claims were secured by a maritime lien under the 1967 Convention (Article 4 - 1(ii), and this provision was left unaltered by the CMI at Lisbon and by the JIGE. Port, canal and other waterway dues are secured by a maritime lien for public policy reasons. It is instead less clear why pilotage dues should also be secured by a maritime lien, when claims in respect of port towage are not.

(e) Loss or damage to property. In order to restrict property claims to claims not based on contract, it was felt necessary to specify that property claims were secured by a maritime lien if they were based on tort and were not capable of being based on contract. The link with the operation of the ship was ensured by stating that the claims secured by a maritime lien were those occurring, whether on land or on water, in direct connection with the operation of the vessel, using therefore the same wording as that in respect of claims for loss or life or personal injury.

At Lisbon it was felt by the CMI Conference that the wording used in respect of property claims was too wide, since it also covered economic losses, whilst the words "not capable of being based on contract" would not wholly exclude claims in respect of loss of or damage to cargo carried on the vessel. The new wording adopted at Lisbon was, therefore, the following:

> Claims based on tort arising out of physical loss or damage caused by the operation of the vessel other than loss of or damage to cargo, containers and passengers' effects carried on the vessel.

This wording was adopted by the JIGE and now appears in the draft articles.

(f) Law costs and expenses. As regards law costs and expenses incurred in order to preserve the vessel after arrest and to procure her sale, it was felt that these costs should not be secured by a maritime lien any further, but should be satisified out of the proceeds of sale prior to their distribution among the holders of maritime liens and other claimants. These claims were therefore moved to Article 11 - 2 of the 1967 Convention.

36. Paragraph 2. Originally, under the 1967 Brussels Convention (Article 4 - 2) reference was made to claims arising out of radioactive properties or a combination of radioactive properties with toxic, explosive or hazardous properties or nuclear fuel or of radioactive product or waste. It was deemed convenient to refer to the cause of the damage, rather than to the international Conventions regulating liability in respect of such type of damage. Therefore, the philosophy was to exclude certain claims because of their nature, and not because they were covered by other Conventions. The text of this paragraph was not altered by the CMI at Lisbon.

37. During the sessions of the JIGE it was deemed convenient to add a reference to another type of damage, viz. pollution damage, but this time reference was made to the International Convention (CLC 1969) regulating such type of damage. It may be questioned whether two different approaches in the two cases are convenient.

Article 5

38. Paragraph 1. This paragraph was left unaltered at Lisbon, save for the reference to charges in addition to mortgages and hypothèques. The text approved at Lisbon was adopted by the JIGE.

39. Paragraph 2. Except for the deletion of the reference to general average and wreck removal, this paragraph was also left unaltered. Some discussions took place during sessions of the JIGE on the reason why claims for salvage should have priority. The reason, however, is clear: salvage services preserve the vessel and therefore inure to the benefit of all those whose claims arose prior to the time when the salvage services were rendered.

40. Paragraph 3. When the principle of the ranking of maritime liens per voyage adopted in the 1926 Convention was abolished, inter alia, because of the difficulty of identifying the concept of voyage, there remained the principle that maritime liens securing the same type of claims should rank pari passu and such principle, accepted by the 1967 Convention for all liens except that for salvage and left unaltered at Lisbon, was adopted by the JIGE. Salvage was excepted for the same reason for which in paragraph 2 subsequent salvage services are granted priority over all liens arisen previously.

41. Paragraph 4. This provision is complementary to those in the preceding two paragraphs: maritime liens securing claims for subsequent services rank in the inverse order of their accrual. The date when a claim for salvage services accrues is stated to be that when each salvage operation terminates. Termination of salvage services occurs, according to the 1989 Salvage Convention, when the vessel has been brought to a place of safety. In fact, Article 8, paragraph 2 of the Salvage Convention provides that at that moment the owner has the duty to accept redelivery.

Article 6

42. The JIGE deemed it advisable to divide Article 6 of the 1967 Convention into two separate articles, the first (article 6) regulating the right of States Parties to grant other liens, and the second (article 6 bis) regulating rights of retention. This decision was reached after several delegations had criticized the insertion in the convention of a provision on rights of retention, which it was argued had a legal nature totally different from that of maritime liens. This problem will be considered under article 6 bis. The following are comments on article 6 of the draft articles.

43. Article 6 reproduces the first part of Article 6, paragraph 1 of the 1967 Convention, which was left unaltered at Lisbon. It was, however, debated during the session of the JIGE whether States Parties should be permitted to grant other liens or, specifically, other maritime liens. In the 1967 Convention (and in the Lisbon Draft) reference is made simply to "liens".

44. It was stated by some delegations that reference to "liens" left in doubt which type of liens States Parties could grant and that, in order to foster ratification of the future convention, States Parties should be authorized to also grant other maritime liens. In such a manner States in whose domestic law maritime liens are much more numerous than in the convention would more easily adapt their domestic laws to the uniform system brought into effect by the convention.

45. It was pointed out by other delegations that maritime liens, even if they rank after mortgages and hypothèques, adversely affect the security of the holders of such registered charges since they may follow the ship into the hands of a purchaser in good faith.

46. The following remarks seem appropriate:

(i) The language adopted in the 1967 Convention is not clear. In fact, reference to "liens" may well be construed so as to include maritime liens.

(ii) The specific reference to maritime liens would have the advantage to make national maritime liens subject to some of the provisions of the convention, such as those of articles 7, 8 and 11. Ideally national maritime liens ought also to be subject to the preamble of article 4, paragraph 1. If this principle were agreed it would, however, be advisable to make this principle entirely clear by inserting a proviso at the end of the first sentence of article 6.

(iii) Indeed, the right of States Parties to grant other maritime liens would be a great incentive to ratification.

47. If these remarks were favourably considered, article 6 could be amended as follows:

Each State Party may grant maritime liens or other liens to secure claims other than those referred to in Article 2; provided, however, that:

(a) Such maritime liens may only secure claims against the owner, demise charterer, manager or operator of the vessel;[2/]

(b) Such maritime liens have the characteristics set out in article 7 and are subject to the same rules in respect of their extinction as those set out in articles 8 and 11;

(c) Such maritime liens and other liens rank after the maritime liens set out in article 4 and after registered mortgates, "hypothèques" or charges which comply with the provisions of article 1.

Article 6 bis

48. The remark that rights of retention have a legal nature different from maritime liens is not disputed. However, there is a need for the inclusion of provisions on rights of retention in the convention in order to protect the holders of the maritime liens set out in article 4 qnd also for the protection of holders of registered charges in order to regulate the extinction of such rights of retention and the duty to release possession in case of forced sale. For these reasons it is strongly recommended that article 6 bis should remain in the convention.

49. However, as suggested by the Chairman of the JIGE, the first sentence of paragraph 2 should be replaced by a new provision in article 11 as that appearing in footnote 1 on page 5 of document JIGE(VI)8 LEG/MLM/27. In fact, the rule according to which the right of retention should not prejudice the enforcement of maritime liens operates at the time of the forced sale and therefore should be more properly part of the provisions that govern the effects of the forced sale. The text suggested by the Chairman will be further considered when article 11 is examined.

2/ This text should be changed if reference to the manager and/or to the operator were deemed unnecessary.

Article 7

50. If it is accepted that States Parties may also grant maritime liens and that they should apply to such liens the relevant provisions of the convention, the reference to article 4 now in square brackets should be deleted. The reference to the change of flag was added at Lisbon because it was thought that there may be situations where a vessel changes her flag without changing ownership or registration. Such a situation occurs, for example, in the case of a temporary change of flag following a bareboat charter, when the vessel, even if temporarily registered in the register of the new flag State, remains registered in the original register.

Article 8

51. Paragraph 1. The wording of this paragraph is that of the 1967 Convention, with the reference to the case of the vessel being seized added at Lisbon. It was in fact thought that since the arrest, according to the definition in Article 1, paragraph 2 of the 1952 Arrest Convention, is merely a security measure and does not include "the seizure of a ship in execution or satisfaction of a judgement", reference ought to be made also to seizure. The purpose of this rule, which was left unaltered by the JIGE, is to ensure that for the protection of all other creditors, as well as prospective buyers, the period during which maritime liens remain in existence without being known to third parties be as limited as reasonably possible.

52. For this reason it was thought that the running of the time limit should be prevented only by an action of which third parties certainly become aware. The arrest was not considered to be sufficient by itself, for if it is lifted, it may not come to the knowledge of claimants. The view was therefore put forward that only the actual enforcement of the security should prevent the running of the time limit. Consequently the arrest would meet this condition, as does the seizure in execution of a judgement, if it leads to the forced sale.

53. Paragraph 2. This provision is complementary to that of paragraph 1. Suspension or interruption of time limits are, in fact, situations which do not become known to third parties. The only exception to this strict rule is that of the lienor being prevented by law to enforce his security by arresting or seizing the vessel. It was thought that in such a case it would be contrary to justice to apply the basic rule set out in this paragraph.

Article 9

54. This provision, which was left unaltered, confirms a general rule which exists in a great number of legal systems and does not call for any comments.

Article 10

55. This is the first of the two provisions that regulate the forced sale of vessels. In view of the fact that the forced sale extinguishes all securities, it was necessary to ensure that the holders of same be given the maximum possible protection. Thus it was thought that:

(a) The sale should yield the maximum possible price;

(b) The proceeds of the sale should be distributed among the holders of secured claimants according to the order of their priorities;

(c) The claimants should be given the best possible opportunity to participate in the forced sale.

Here follows an analysis of the provisions of this article:

56. Paragraph 1. This paragraph indicates to which persons notice must be given. Such persons are those already indicated in Article 10 of the 1967 Convention which was left unaltered by the CMI Lisbon Conference. The order in which they were listed has, however, been changed, as has the wording.

(a) In Article 10, paragraph 1(c) of the 1967 Convention reference was made to the registrar in the English text and the "conservateur" in the French text, whilst now reference is made to the "authority in charge" (of the register). This latter expression is more general and therefore better. In fact, in several countries the authority in charge of the register is not called registrar or "conservateur".

(b) The wording has not been changed and seems to be satisfactory.

(c) There have been two changes as regards the text adopted by the 1967 Convention. The first consists of the replacement of the words "such holders ... whose claims have notified etc" with the words "all holders ... provided that the competent authority ... received notice ...". The two expressions are equivalent and also that presently used seems to be acceptable. The second change consists of the identification of the authority to which notice must be given as "the competent authority conducting the forced sale". In the preamble of Article 10, paragraph 1 of the 1967 Convention, the words used are "the competent authority" and in sub-paragraph (b) reference is made to the preamble with the words "the said authority". The reference to the authority conducting the sale may be an improvement on the original text, but if this language is adopted the qualification of such authority as "competent" is not only superfluous, but even dangerous because it might imply that if notice is given to the authority conducting the sale which, however, is not competent, the notice may not be effective. The claimants should not be required to establish whether or not the authority conducting the sale is competent.

57. In the opening sentence the words used are instead, as in the 1967 Convention, "competent authority". The difference in the wording does not seem to be justified, for the authority which must establish that notice of the sale must be given to the persons listed thereafter cannot be other than the authority conducting the sale.

58. Paragraph 2. Whilst in Article 10 of the 1967 Convention it was merely provided that there should be a 30-day advance written notice of the time and place of sale, in the draft articles an alternative content of the notice is proposed (in square brackets), viz, such particulars as "the State conducting the proceedings shall determine is sufficient to protect the interests of persons entitled to notice". The wording adopted in the 1967 Convention and reproduced in this paragraph under (a) requires a minimum content, whilst the alternative text leaves to the lex fori the determination of the content. It would appear that for the protection of the claimants in general and of secured claimants in particular, the minimum content of the notice should be specified in the convention. In any event, the wording suggested is not satisfactory. First, proceedings are not conducted by the "State" but by the judicial authority of a State; secondly, the particulars mentioned in the draft may not be determined at all or may not be determined with an assessment of their sufficiency for the protection of the interests of the persons entitled to notice; thirdly, such particulars, if determined at all, are normally set out in a law.

59. Paragraph 3. This paragraph reproduces in more detail the requirement appearing in the opening sentence of Article 10 of the 1967 Convention, that the notice must be in writing. It, however, adds a condition, viz, that there must be confirmation of receipt. This condition seems appropriate for the protection of the claimants.

60. Paragraph 4. This paragraph does not seem necessary, but if accepted would not create problems.

Article 11

61. Paragraph 1. Two amendments have been made to the text appearing in the 1967 Convention: in (a) the words "in the jurisdiction" have been replaced by "in the area of the jurisdiction"; in (b) the reference to the provisions of the Convention have been replaced by a reference to articles 10 and 11. The first amendment does not seem to be an improvement but leaves the meaning unaltered. The second amendment at first sight seems to limit the provisions that are relevant to articles 10 and 11 but this is not so, since paragraph 2 of article 11 provides that the proceeds of the sale, after payment of the costs specified therein, must be distributed in accordance with the provisions of the convention and therefore brings back the global reference that has been deleted in paragraph 1.

62. Paragraph 2. Some of the costs that must be paid out of the proceeds of sale prior to their distribution among the secured claimants have been specified. These are the costs for the upkeep of the vessel and the costs of repatriation of the crew. Since it seems proper that both such costs be paid prior to the distribution of the proceeds, the addition was advisable, for otherwise it might have been uncertain whether or not they could be treated as "costs and expenses arising out of the arrest or seizure". The rule on the distribution of the proceeds among the claimants has been simplified but this has not affected its clarity.

63. Paragraph 3. As mentioned under article 6 bis, the addition of a new paragraph, to be numbered paragraph 3, was suggested by the Chairman of the JIGE in place of the first sentence of paragraph 2 of article 6 bis. The purpose of such new paragraph, which is properly included in article 11, is to ensure that the right of retention of the shipbuilder or of the shiprepairer may not be an obstacle to the forced sale, at the same time safeguarding the interest of ths shipbuilder or shiprepairer. The new provision is satisfactory and its adoption is recommended.

64. Paragraph 4. (Formerly paragraph 3). The wording of this paragraph is exactly that approved by the CMI at Lisbon. It must be noted, however, that if the changes adopted in article 10 are maintained, the reference to the "competent authority" in the second line should be replaced by "[competent] authority conducting the forced sale" and the reference to the "registrar" in the seventh line should be replaced by "authority in charge of the register in the State of registration".

65. Paragraph 5. (Formerly paragraph 4). This is an additional condition which has been properly made.

Article 12

66. It is indispensable that the uniform rules be applied in all cases, in order to ensure complete uniformity. Nor can it be argued that a convention can only bind States Parties, for this provision, once enacted in the domestic laws of States Parties, becomes a private international law rule that States are perfectly free to adopt.

Article 15

67. This article, which was drafted in the course of the fourth session of the JIGE, has been made necessary by the increasing number of States that allow temporary suspension of flag for vessels registered in their registers when they are bareboat chartered to a foreign charterer and are permitted to fly the flag of the charterer's State and conversely, allow that foreign vessels bareboat chartered by nationals temporarily fly the flags of such States.

68. It was discussed whether it would be proper to insert an additional provision covering this situation in all the relevant articles of the draft, but it was decided that it would be by far preferable to deal with all the effects of the temporary change of flag in one article only, in order to allow the complete application of all other provisions to the normal situation of vessels flying the flag of the State of registration.

69. This article should perhaps be moved upwards after the present 12. The following is a short analysis of the various provisions of the article.

(a) It is necessary to clarify to which State and which registrar the provisions of the convention apply in the case of a temporary suspension of flag. There does not seem to be any doubt that such State and such registrar must be those of the permanent registration. In the text the registrar is referred to as the "competent authority in charge of the register". The word

"competent" should be deleted, since at present in article 10 paragraph 1(a) reference is made to the "authority in charge of the register".

(b) This choice of law rule was also necessary, for registerable charges continue to be registered in the permanent register.

(c) Doubts have been expressed as to the use of the word "register" in relation to the book where the vessel is temporarily recorded, for the reason that that might imply that dual registration is permitted. This concern is understandable. It has been suggested using the word "record" instead of "register" but it is questionable whether the problem would be solved. In any event, the word used should be the same in this paragraph (where now the word "register" is used) and in paragraphs (e) and (f) (where the word "record" is used).

Perhaps the problem might be overcome by replacing the word "register" in the last line with "the special register in which such vessels are registered".

The requirement of a cross-reference should, in any event, be extended to the certificate of registry issued by the State whose flag the vessel is permitted to fly temporarily, for this is the document that more frequently will be examined by third parties.

(d) In this paragraph two alternatives are considered, viz:

(i) satisfaction of all registered charges, or

(ii) consent of the holders of such charges.

The suggestion has been made to delete the first one and such suggestion is correct, for if the charges are satisfied, they will no longer appear in the register.

(e) This requirement seems to be proper, subject to the word used to identify the "record" or "register" being the same as in paragraph (c). For the reason stated under (a) above, the word "competent" (authority) should be deleted.

(f) The same comment must be made in respect of this paragraph. If the suggested new paragraph 3 is inserted in article 11 reference should be made here to paragraph 4 of article 11. Also here the word "competent" (authority) should be deleted.